Filed 8/18/04 P. v. Torres CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANTHONY TORRES,

Defendant and Appellant.

F041212

(Super. Ct. No. 670950-5)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Gary S. Austin, Judge.

Bradley A. Bristow, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Carlos A. Martinez and Virna L. DePaul, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On April 24, 2002, an information was filed in the Superior Court of Fresno County charging appellant Jose Anthony Torres with count I, first degree murder (Pen.

Code, § 187, subd. (a)),[1] with the special allegation that he personally discharged a firearm which caused great bodily injury or death (§ 12022.53, subd. (d)). Appellant pleaded not guilty and denied the firearm allegation.

On June 19 and 20, 2002, the court denied appellant's motions to discharge his appointed counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. Thereafter, appellant's jury trial began. On July 2, 2002, the jury found appellant guilty and found the firearm allegation true.

On August 2, 2002, the court denied probation and sentenced appellant to 25 years to life for count I, with a consecutive term of 25 years to life for the section 12022.53, subdivision (d) allegation.

On August 7, 2002, appellant filed a timely notice of appeal.

FACTS

On the evening of April 25, 2000, Ny Noy was fatally shot in the back outside his apartment building on South Dearing Street in Fresno. Appellant Jose "Rapid" Torres was immediately suspected of the killing. Appellant believed his girlfriend was having an affair with Mr. Noy, and he spent the preceding days searching for Mr. Noy and threatening to kill him. In February 2002, appellant was apprehended after being in Mexico for nearly two years. Appellant claimed he didn't shoot Mr. Noy and he left for Mexico just a few hours before the homicide. Appellant was convicted of first degree murder with a firearm enhancement and sentenced to 50 years to life.

The Neighborhood

Appellant and Sorn "Lisa" Yim had two children and were together for about five years. In March 2000, Lisa wrote to appellant that she didn't want to be with him anymore. Appellant believed Lisa was having an affair with their neighbor, Ny Noy. In

[1]All statutory citations are to the Penal Code unless otherwise indicated.

March 2000, appellant sent Lisa two letters and threatened to kill Mr. Noy because of the alleged affair. At trial, Lisa testified she never had a sexual relationship with Mr. Noy.

At some point in April 2000, appellant returned to Fresno County after being gone for several months. Appellant told his brother that he believed Lisa was having an affair. Appellant told his sister that Lisa was having an affair with Mr. Noy, and appellant was sad about it.

Ny Noy and his wife, Sary Phan, lived at an apartment complex on South Dearing Street, just down the street from where appellant and Lisa had lived together. The neighborhood was predominantly Cambodian. Ms. Phan knew appellant and Lisa, and she used to see appellant around the South Dearing apartment complex "off and on." As of April 2000, she hadn't seen appellant for several months. Ms. Phan knew Lisa very well and was close to her.

Sitha Yith was a close friend of Mr. Noy. A few days before April 25, 2000, Mr. Noy told Mr. Yith that appellant was looking for him and going to hurt him. Mr. Noy appeared to be depressed and worried. Mr. Yith advised Mr. Noy not to get into a fight with appellant.

April 22, 2000

Kathy Sao was married to Lisa Yim's brother. The Saos lived in an apartment on Hamilton, which was very close to Mr. Noy's apartment building on South Dearing. On or about April 22, 2000, appellant went to Kathy Sao's apartment and said that Lisa was having an affair with another guy. Appellant initially used a normal tone of voice, but he became more "hyped up" and said Lisa was a bitch and a whore. Appellant wanted to know where Lisa was, and Ms. Sao replied that she didn't know. Appellant told Ms. Sao that "whoever is hiding Lisa or whatever, he's going to whatever kill him or whatever. Then he's going to find out who that guy is and kill him and Lisa." Ms. Sao testified appellant yelled and acted "kind of scary," but he was also smirking.

On or about the same day, appellant found Lisa at her mother's house and asked Lisa to reconcile with him. Lisa refused and said she didn't want to be with him anymore. Appellant accused her of having an affair with Mr. Noy and Lisa denied it. Appellant threatened to kill Lisa and the children, and then shoot himself.

April 23, 2000

On or about April 23, 2000, appellant again appeared at the Saos' apartment. Appellant asked Mr. Sao if he had a gun. Mr. Sao didn't respond and went into the apartment. Kathy Sao told appellant they didn't have a gun, and "'if we had a gun, why would we want to give it to you if you're going to go kill his sister?'" Appellant didn't reply and left.

April 24, 2000

On April 24, 2000, appellant called Sary Phan, Mr. Noy's wife. Appellant said that Mr. Noy was having an affair with Lisa, and threatened to kill him. Mr. Noy was not home when Ms. Phan received the call. Ms. Phan gave appellant the cell phone number for Somonn In, who was Mr. Noy's employer. Ms. Phan later talked to Mr. Noy about appellant's accusation. Mr. Noy said it wasn't true and he didn't know what appellant was talking about. Ms. Phan trusted Mr. Noy and didn't believe the accusation.

Also that day, appellant arrived at the home of Lisa Yim's mother and asked if Lisa and the children were there. Appellant had a straight face and didn't smile. Mrs. Yim replied they weren't there. Appellant asked to come in, and she allowed him to enter the house. Appellant searched the residence for Lisa and the children. Appellant asked where they were, and Mrs. Yim replied that she didn't know. Mrs. Yim testified that as appellant left, he said: "'If I could not find my wife and my children, I will kill them all,'" or that he would kill "Lisa and my family." Appellant used a normal voice

and did not scream at her, but he was very serious. Appellant didn't say why he was looking for them.[2]

At some point that day, Sitha Yith saw appellant on South Dearing Street. Appellant said he was looking for Mr. Noy, and he had to talk to Mr. Noy to solve their problem.

April 25, 2000

As of April 25, 2000, appellant had called Somonn In's cell phone more than 10 times and asked to speak to Mr. Noy. Mr. Noy told Somonn In that appellant wanted to hurt him. Mr. Noy went to work that morning with Somonn In. Mr. Noy asked Mr. In if he would go home with him that evening because he was scared. Mr. Noy thought the person would not carry out the threats if Mr. In was with him. Mr. Noy did not say anything about wanting to hurt appellant.

Mao Samreth lived in the apartment building behind Mr. Noy's residence, and he knew Mr. Noy very well. Mr. Samreth briefly spoke with Mr. Noy on April 25th, but Mr. Noy did not say anything about being afraid or threatened.

On the morning of April 25, 2000, Lisa Yim went to the police department to obtain an emergency protective order against appellant. Lisa testified she decided to get the order because of threats he made against her a few days earlier. Lisa was scared because she knew appellant had been looking for her that week. Officer John Conlee spoke to Lisa about the protective order, and she said appellant talked to her mother the previous day and threatened to kill her. Lisa also said appellant spoke to her the previous Saturday at her mother's house and created a disturbance. Lisa called the police but appellant left before they arrived.

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[2]Lisa had moved in with appellant's brother, who was sympathetic to her decision to stay away from appellant.

On the afternoon of April 25th, Sary Phan, Mr. Noy's wife, saw appellant in the parking lot of her apartment complex on South Dearing. Appellant said he was looking for Mr. Noy and needed to talk with him. Appellant said Mr. Noy had an affair with Lisa and he wanted to kill him.[3] After appellant left, Ms. Phan called Mr. Noy and warned him about appellant's threats. Ms. Phan told Mr. Noy to be careful, but he had to take care of this problem with appellant. Mr. Noy replied he had nothing to worry about because he didn't have any problems with appellant.

Rann Phan, Mr. Noy's sister-in-law, lived downstairs in the same apartment building as Mr. Noy and his wife. Around 1:00 p.m. on April 25, 2000, appellant arrived at Rann Phan's apartment and asked if Mr. Noy was there. Appellant accused Ms. Phan of hiding Mr. Noy, but she repeatedly said that Mr. Noy wasn't there. Ms. Phan testified appellant was very angry, his voice was loud, his eyes were "just shifting all over the place" as he looked through the doorway, and she was afraid of him.

Rann Phan testified appellant returned to her apartment five times that day, and repeatedly insisted she was hiding Mr. Noy. Appellant's last visit to her apartment was around 6:00 p.m. Ms. Phan testified that appellant looked "like he was going to kill someone." Ms. Phan also saw appellant in the parking lot and breezeway of the South Dearing apartment building.

Around 5:00 p.m. on April 25, 2000, Kathy Sao saw appellant in a maroon-colored minivan which pulled into the parking lot of her apartment building on Hamilton.

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[3]Sary Phan, Mr. Noy's wife, initially testified that appellant threatened Mr. Noy when she saw appellant in the parking lot on April 25th. Ms. Phan later testified appellant only threatened Mr. Noy during the telephone call on April 24, 2000. Ms. Phan was impeached with her statement to the police that appellant never threatened to harm Mr. Noy. Ms. Phan clarified that she was only meant appellant didn't make any threats when she saw him in the parking lot.

Appellant was in the passenger seat, but someone else was driving and there were other people in the car.[4]

The Homicide

Around 7:00 p.m. on April 25, 2000, It Chey drove his Chevrolet Blazer to Mr. Noy's apartment on South Dearing to socialize and drink beer. Mr. Noy was not home yet, so Mr. Chey sat on the balcony, drank beer and waited for him.

Mr. Noy and Somonn In arrived at the apartment complex after work, and they met It Chey. Mr. Noy briefly went into his apartment to speak with his wife, then went down to the garage and drank beer with Mr. Chey and Mr. In. At some point during the evening, Mr. Noy told Mr. Chey that someone was trying to hurt him. Mr. Noy asked Mr. Chey to keep his eyes open. Mr. Noy also received several calls on his cell phone.

At some point between 7:00 p.m. and 8:00 p.m., Mr. Chey and Mr. In left Mr. Noy's apartment building in the Blazer. Mr. Chey drove to Mr. In's house because Mr. In needed to clean up after work.

Around 8:00 p.m. on April 25, 2000, Sitha Yith joined Mr. Noy in front of the garage at the South Dearing apartment building. Mr. Yith testified Mr. Noy received a telephone call, and Mr. Noy told the caller to come by in about 20 or 30 minutes. Mr. Noy told Mr. Yith that he had been talking to appellant, that appellant wanted to speak with him, and appellant was going to arrive at the apartment building within a half hour. Mr. Noy advised Mr. Yith "to kind of watch out" because Mr. Noy was afraid of appellant and didn't know if appellant was going to come "with any type of weapons or not." Mr. Noy was afraid appellant might shoot him. Mr. Yith told Mr. Noy to be careful, to stay by the parked cars in the garage, and not to go outside because a bullet

[4]On cross-examination, Kathy Sao admitted she failed to tell the police about all her contacts with appellant before the shooting.

"does not have eyes, so it cannot see you so if you try to hide." Mr. Noy never said that he wanted to confront or hurt appellant. Mr. Yith did not see Mr. Noy with a gun. Mr. Yith stayed with Mr. Noy at the garage and waited for a half hour.

While they were waiting, Mr. Chey and Mr. In returned in the Blazer, and Mr. Chey parked on the street near the building's driveway. Mr. Yith continued to wait for appellant but he never arrived, and Mr. Yith decided to leave. Around 9:00 p.m., Mr. Yith walked across the street to his own apartment. Mr. Yith testified he was crossing South Dearing Street when he saw appellant sitting on the staircase of the apartment complex across from Mr. Noy's residence. Mr. Yith passed appellant but didn't speak to him. Mr. Yith noticed a red Honda and a blue Honda were parked on the street.[5]

Mr. Chey and Mr. In remained in the Blazer, which was parked on the street. Mr. In opened the passenger door and they talked with Mr. Noy for about five minutes. Mr. Noy then decided to return to his apartment. Mr. In warned Mr. Noy to be careful, stay in his house, and lock the door. Mr. Noy turned toward the apartment building and headed into the parking lot.

As Mr. Noy walked toward the building's staircase, Mr. In heard something smash into the Blazer's back window and break the glass. Immediately thereafter, Mr. Chey and Mr. In heard gunshots being fired from the street behind the Blazer. Mr. Chey testified more than five shots were fired very fast. The shots seemed to be fired from the rear driver's side of the Blazer, and about 15 to 18 feet away.

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[5]Mr. Yith's sequence of events conflicts slightly with Mr. Chey's testimony. Mr. Chey testified he returned to Mr. Noy's apartment building with Mr. In, and he parked his Blazer on South Dearing Street near the building's driveway. Both Mr. Chey and Mr. In testified Mr. Noy was not outside and had returned to his apartment. Mr. In called Mr. Noy and said they were back, and Mr. Noy returned outside.

Mr. In heard someone yell and shout just before the shots were fired, and Mr. Noy turned around. This person continued to yell as the shots were fired. Mr. In recognized this person's voice as the same man who repeatedly called his cell phone and talked to Mr. Noy that week.

Mr. In thought three to five shots were initially fired. Mr. In turned around and saw the muzzle flash. He also saw a person's shadow behind the passenger side of the Blazer. Mr. In believed the person was holding "a long gun" or a rifle. Mr. In also believed the gunman was wearing a brown cap.

Mr. In told Mr. Chey to take off because someone was shooting at them. Mr. Chey started the Blazer and tore down the street. Mr. Chey did not see Mr. Noy's reactions to the shots because he was too busy driving away. They went about 250 feet when someone fired two or three shots at the Blazer, from a position about seven to 10 feet behind the vehicle.

Mr. Chey drove down South Dearing Street, but he quickly turned around and returned to the apartment building to look for Mr. Noy. Mr. In testified someone shot at them again as they turned around, and he saw one person standing in the middle of the street. Mr. In could clearly see the muzzle flash from the gun barrel, and this weapon appeared to be a handgun. Mr. In testified the gunman pointed the weapon at them, fired the shots, and then ran away.

Mr. Noy's apartment building on South Dearing is back-to-back with an apartment building on South Recreation Street. There is a dirt alley behind the South Dearing building. A wooden fence separates the back of the two buildings. There is a gap between the fence slats which allows a dirt path to pass between the two buildings. The neighbors regularly use the fence gap as a short-cut between the buildings.

Mr. Chey pulled into the building's parking lot. Mr. Chey and Mr. In jumped out of the car and ran around the apartment complex to look for Mr. Noy. Neither Mr. Chey nor Mr. In went through the fence gap or looked behind the building.

Sitha Yith, who lived across the street, also heard the gunshots that night. Mr. Yith testified that about 15 minutes after he left Mr. Noy and walked past appellant, he heard "quite a few" shots fired in a continuous succession, but he didn't see anyone with a gun. Mr. Yith ran back to Mr. Noy's apartment building and didn't see appellant. Mr. Noy's wife also heard the shots and said that Mr. Noy was missing. Mr. Yith joined other neighbors who were running around the complex and looking for Mr. Noy, but Mr. Yith didn't go through the fence gap behind the building.

Mr. Yith testified the red and blue Hondas, which had been parked on South Dearing Street, "sped out very fast" after the shooting, but he couldn't see the occupants.

Around 10:00 p.m. on April 25, 2000, Mao Samreth was in his residence in the apartment building on South Recreation Street, behind Mr. Noy's building, when he heard gunshots fired. Mr. Samreth went downstairs to investigate and walked through the fence gap to the apartment building on South Dearing Street. He didn't see anyone on the path through the fence gap.

Around 10:30 p.m. several officers from the Fresno Police Department responded to South Dearing Street to investigate the shooting. The officers initially detained Mr. Chey and Mr. In as suspects because they were very excited, running around, and still looking for Mr. Noy.

Mao Samreth stayed at the scene and watched the police interview witnesses. Mr. Samreth watched for "a while" and then decided to return to his apartment through the fence gap. As he walked along the path, he saw three beer bottles on the ground and decided to collect them for resale. He leaned down to pick up the bottles and suddenly saw a body on the ground. Mr. Samreth dropped the bottles and shouted to the police that he had found Mr. Noy. Mr. Samreth testified "quite some time" had passed between his initial walk through the fence gap to reach South Dearing Street, and when he headed back to his own apartment and found Mr. Noy.

The Crime Scene

Mr. Noy's body was found on the west side of the fence gap behind his apartment building. He was lying face-down on the ground. He had suffered a single fatal gunshot wound in the back from a .22-caliber hollow-point bullet. The bullet's path was from right to left, and slightly upward. The bullet inflicted fatal damage to Mr. Noy's heart, lung, and liver, and lodged in his upper left rib cage. Mr. Noy also suffered nonfatal abrasions on the right side of his face, which occurred when he fell to the ground.

The officers found a trail of blood on the ground, and blood drops behind the South Recreation Street apartment building. There were no blood drops on the west side of the fence gap, except for the blood around the victim's body. There were shoe prints on the east side of the fence gap, and partial shoe prints on the west side. The shoe prints appeared to match the victim's shoes.

The officers found seven expended .22-caliber cartridge casings in front of Mr. Noy's apartment building on South Dearing Street. The markings on the fatal bullet were consistent with those on the expended .22-caliber casings. A criminalist later determined the fatal bullet and casings were fired from a Mossberg rifle.

The only weapon recovered from the scene was a .38-caliber revolver, which was found on the east side of the fence gap, about 16 feet from Mr. Noy's body. The revolver was partially inside a plastic bag. There was blood and dirt on both the gun and the bag. The revolver was fully loaded with six live .38-caliber bullets but it had not been fired. There were four live .38-caliber bullets in the victim's front right jacket pocket, and another live round was found inside the lining of his jacket. There were no shell casings at the scene which matched the .38-caliber revolver. There were no fingerprints on the .38-caliber revolver, the .38-caliber bullets, or the .22-caliber expended casings.

Officer John Panabaker searched Mr. Chey's Blazer but did not find any weapons, guns, or ammunition. The rear driver's side window had been damaged by some type of blunt force rather than a bullet.

Detective Brad Alcorn testified that based on the shoe prints, blood drops, the location of the revolver, and the victim's location, he believed the victim went through the fence gap and collapsed. Detective Alcorn testified the revolver had recently been placed there because it appeared the path through the fence gap was frequently traveled and worn. The gun was lying near the center of the path. The blood drops on the gun and plastic bag seemed very fresh and recent. It appeared as if someone who was holding the gun had been bleeding, and either threw or dropped the revolver on the ground.

The Investigation

Officer Panabaker interviewed Mr. Chey at the scene that night. Mr. Chey said he drove to the apartment complex with two other people, dropped off "his brother," and had "another brother" in the car with him. Mr. Chey said he pulled into the apartment's driveway and heard five shots, and believed they were fired from a nine millimeter. Mr. Chey stated one of "his brothers" ran out of the vehicle, and his other "brother" stayed inside and took cover. Officer Panabaker testified he had some experience dealing with members of the Cambodian community, and it was common for them to refer to each other as brothers, as if they were talking about their friends. Officer Panabaker testified that Mr. Chey had a slight odor of alcohol but did not appear to be under the influence.

On April 26, 2000, Detective Douglas Stokes was contacted by appellant's brother, John, who stated that appellant might have called their sister, Patty. Detective Stokes immediately called Patty Torres, who was "somewhat emotionally upset" and very concerned about appellant. Ms. Torres said she spoke with appellant, she thought he was suicidal, and she was afraid he was not going to turn himself in. About two minutes into the telephone call, Detective Stokes activated a tape recorder and recorded the rest of his conversation with Ms. Torres.

According to the transcript, Ms. Torres told Detective Stokes she spoke with appellant, and he threatened to shoot himself before he would turn himself in. Appellant was crying and very upset during the telephone call. Appellant said to tell Lisa he wasn't

"fucking playing, that I was serious and she was taking it like a fucking joke and I wasn't." Appellant said he was hurting bad because he still loved Lisa but she broke his heart. As the telephone conversation continued, Detective Stokes appeared to summarize what Ms. Torres said before he activated the tape recorder. Stokes commented that appellant seemed to say that he was scared and didn't mean to kill the guy, and Ms. Torres said yes. Stokes also commented that appellant said he just wanted to talk to the guy and felt "disrespected" by what Lisa did, and Ms. Torres agreed. Ms. Torres added that appellant was upset because the guy was married and he didn't know why the guy became involved with Lisa.

> "[Detective Stokes] And so he went up to talk to him and he said the guys were there and the ... and he saw they had some guns in the Blazer.
>
> "[Ms. Torres] Yeah, they had guns in the Blazer.
>
> "[Detective Stokes] That's what he's telling you?
>
> "[Ms. Torres] Yeah, guns. And the other guy had brass knuckles on his ... on his hands, and he got scared. He goes, and I was there all by myself. He goes, I went there to confront him all by myself. He goes, I didn't have nobody with me, and he goes, once I seen that man, he goes, that's it. He goes, shit, I ... I told him hey, what's up man?
>
> "[Detective Stokes] Why did he ... did he say why he took a gun there to begin with though? I mean, had he not taken.…
>
> "[Ms. Torres] Because his home-boys ... he said his home-boys had told him that they had guns, brass knuckles and ... and crowbars and stuff like that in the Blazer, that they were looking for him all day like crazy. And that was it. That's all he told me.…"

Ms. Torres continued to recount the conversation, and that appellant said Mr. Noy and his two friends were looking for him but appellant didn't know why.

Detective Stokes advised Ms. Torres that other people said appellant had been looking for Mr. Noy that week. Ms. Torres said she didn't think appellant had bad

intentions, that he just wanted to talk to Mr. Noy, "face to face, man to man," and ask why Mr. Noy was hurting him.

> "[Detective Stokes] But he ... told you that the only reason that he took a gun there was that he had been told that these other guys had guns?
>
> "[Ms. Torres] Yeah, had guns and …
>
> "[Detective Stokes] And he just wanted to talk to the guys, huh?
>
> "[Ms. Torres] ... and that he just wanted to talk to the guy, and he went and confronted him all by himself, but when he ... Ny come out, uhm … his other two friends were waiting for him too, and he (inaudible)"

Appellant repeatedly told Ms. Torres that he was tired, he didn't care anymore, and he would kill himself if the police tried to take him. Detective Stokes advised Ms. Torres to call him immediately if appellant contacted her again because "we need to get him off the street" before he did something stupid with the gun.

Also on April 26, 2000, Somonn In received a call on his cell phone from an anonymous person, who said that he did what he had to do. Mr. In recognized the caller's voice as the same person who had repeatedly called that week and asked to speak with Mr. Noy. Mr. In subsequently received another call at his house from a different person, and this person threatened him.

Appellant apparently escaped to Mexico. At some point, he tried to return to the United States but was stopped by the Border Patrol. He jumped over the counter and escaped, but left behind his identification papers. Appellant was finally taken into custody in Nogales, Arizona, in February 2002. Appellant's brother and sister testified they had family in Mexico but they didn't know appellant went there, and they didn't know where he was for two years.

On February 18, 2002, Detective George Von Euw went to Nogales to interview appellant. Appellant was advised of the warnings pursuant to *Miranda v. Arizona* (1966)

384 U.S. 436 and agreed to answer questions. Detective Von Euw asked appellant how long he had been in Mexico. Appellant replied: "'I don't know. Two years.'"

Additional Prosecution Evidence

At trial, Lisa Sorn Yim repeatedly testified she never had an affair with Mr. Noy.

Sary Phan, Mr. Noy's wife, testified she never heard Mr. Noy make threats toward appellant or anyone else related to this incident.

Mr. Chey testified he did not possess a gun, brass knuckles or any weapon on the night of the shooting. He never saw Mr. Noy or Mr. In with such weapons, and he never saw Mr. Noy with a gun. Mr. In similarly testified he never saw Mr. Noy with a gun or any type of weapon. Mr. In testified they didn't have brass knuckles, pipes, or any type of weapon in the Blazer that night, and they never discussed a plan to beat or scare appellant. Mr. In denied that he told an officer that Mr. Noy said he was going to get a gun to protect himself.

At trial, Patricia Torres, appellant's sister, denied she spoke with appellant after the killing or that he made inculpatory admissions. Ms. Torres admitted she spoke to Detective Stokes, but claimed she didn't remember what she told Stokes, and that she lied about everything and made up the inculpatory statements she attributed to appellant because she was angry at him. Ms. Torres claimed that at the time of the killing, she was angry with appellant because he owed her $500, he asked to borrow her car, and he called her a bitch during an argument. When Detective Stokes called and asked her about appellant, she lied about appellant's purported telephone call because she was still angry with appellant. Ms. Torres knew appellant had been sad and angry about breaking up with Lisa, and she heard about the shooting from other family members. She relied on these facts to make up the story to Detective Stokes.

On cross-examination, Ms. Torres claimed Lisa told her that Mr. Noy's friends were in a Chevy Blazer and they had weapons. On further examination, Ms. Torres

claimed Lisa just told her that Mr. Noy was looking for appellant. Ms. Torres also claimed she knew about the men in the Blazer because she confronted them.

> "Q So, any suggestion that anybody in that Blazer had guns, [appellant] didn't tell you ... you made that up.
>
> "A I knew. I knew that they had guns. I knew that Ny had guns.
>
> "Q Really. Who told you that?
>
> "A Because, I just knew.
>
> "Q Who told you that?
>
> "A Nobody told me that."

Ms. Torres claimed "a friend" told her about the men in the Blazer, but she refused to disclose the friend's identity.

Ms. Torres admitted that when she testified at appellant's preliminary hearing, she denied making any statements to Detective Stokes and she didn't know he had tape-recorded their telephone conversation. She felt Stokes violated her constitutional rights because he didn't tell her about the tape recording.

> "Q So your plan was what, that if they ever talked to me about the conversation I had with Detective Stokes on the stand under oath, I'll just lie and say it never happened?
>
> "A Yes. Uh-huh.
>
> "Q It wasn't until you learned that you were on tape that all the sudden now we got a story that I just made that up because I was angry with your brother; is that correct?
>
> "A Correct. [¶]…[¶]
>
> "Q Once again, you would not have made those statements had you known that your conversation was being taped; isn't that correct? [¶]…[¶]
>
> "A Correct."

Ms. Torres realized she had implicated appellant in the killing as soon as she finished speaking with Detective Stokes, and she felt bad about it. However, she never called the police and advised them that she lied about appellant's purported admissions.

Appellant's Testimony

Appellant testified at trial against his counsel's advice. Appellant testified that he was in New Mexico when Lisa informed him that she was having an affair with Mr. Noy. Appellant testified that on the morning of April 25, 2000, he went to Lisa's house and tried to reconcile with her. Lisa refused to reconcile and called Mr. Noy while appellant was there. Lisa threatened to call the police, and appellant left around noon. Appellant testified he immediately left for Mexico, and he didn't return until he was arrested in this case. Appellant denied shooting Mr. Noy and testified he wasn't at the apartment complex that night.

On cross-examination, appellant testified that he returned to Fresno from New Mexico on April 21, 2000, and he spoke to Lisa at her mother's house on April 22, 2000. Lisa didn't want anything to do with him and told him to leave. Appellant testified he was just trying to collect his belongings but she threatened to call the police. Appellant testified he never threatened Lisa. Appellant admitted he went back to the home of Lisa's mother, and looked through the rooms for Lisa and the children because "I care about my kids." Appellant testified he saw Lisa at his brother's house on April 24, 2000. He just visited with his children and didn't speak to Lisa because she was angry.

Appellant insisted he never threatened Lisa and he was never angry with her.

"Q During all of this, you never got upset?

"A No, I did not. When I got released,[6] she wasn't a virgin. What was I going to get upset—

"Q You weren't upset because she wasn't a virgin?

"A When I got with her. I got with her in 1991.

"Q Can you explain to me what her status as a virgin or lack of virginity has to do with whether you were upset?

"A You know she had other relationships. [¶]…[¶]

"Q And the reason you're not upset is because she wasn't a virgin when you got together?

"A Ain't got nothing to do—

"Q That's my question. Why did you bring it up?

"A I'm telling you.

"Q Okay. Were you upset?

"A I was not."

Also on cross-examination, appellant admitted he went to the homes of various relatives to look for Lisa. Appellant denied he was angry or that he threatened Lisa when he looked for her.

"Q You heard [Kathy Sao] say that you were anything but calm, you were threatening to kill people.

"A That's her. She has mental problems. She takes medication.

"Q Okay. So, you didn't say that. She's in here lying because she has mental problems.

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[6]Appellant's reference to being "released" referred to the fact that he had been in prison in New Mexico in the months before the shooting. While other witnesses mentioned that appellant had been in New Mexico, the court had excluded evidence as to the reason he was there.

"A Who knows?

"Q Well, I'm asking you.

"A I know she takes medication. I know she hits her kids.

"Q So, we shouldn't believe her testimony in here because she has mental problems and hits her kids?

"A You believe what you want to believe."

Appellant testified the witnesses who claimed they saw him on the afternoon of April 25th were lying because he left Fresno at noon and arrived in Mexico that night. Appellant left Fresno because Lisa "did it to me," and she didn't care whether the children had a father.

Appellant testified he was "chased out" of Mexico in February 2002. Appellant denied that he previously tried to return to the United States, that he was stopped by the Border Patrol, or that he left his identification and birth certificate at the Border Patrol station. Appellant testified he lost these documents in Mexico and didn't know how they ended up with the Border Patrol.

Appellant testified he wanted to be a father to his children, but he left for Mexico to start a new life.

"Q But, despite that, you decided just to leave on the same day that Mr. Noy was shot?

"A I left before that.

"Q On the same day though, right?

"A On the same day."

Appellant admitted "some[one]" called Mr. Noy's wife for him on April 22d, and said her husband was having an affair. Mr. Noy's wife hung up. Appellant called back to get an answer, and she gave him Mr. Noy's telephone number. Appellant called and Somonn In answered, and gave Mr. Noy the telephone. Appellant asked Mr. Noy if he was having an affair with Lisa, and Mr. Noy denied it.

> "Q If you don't care, as you've testified to, why are you calling Noy's wife, Noy's employer all looking for Noy?
>
> "A I did not care she had an affair with him, right? I'm trying to get back with her, but I was asking him to see if it was true."

Appellant denied that he repeatedly contacted Mr. Noy, or that he arranged to meet Mr. Noy on the evening of April 25th to talk things over. On further cross-examination, the prosecutor asked if appellant still had feelings for Lisa, and appellant said no. The prosecutor asked why appellant cried during Lisa's trial testimony, and appellant said it was for his children.

Appellant denied that he called his sister after the shooting or that he told her anything. Appellant testified he never fired a gun at Mr. Noy because he felt his life was in danger, he was upset about Mr. Noy's affair with Lisa, or he thought Mr. Noy was going to pull a gun at him. Appellant insisted he wasn't there that night and he had already left for Mexico.

The Stipulations

The parties stipulated that Detective Stokes would testify to the following statements made by witnesses when he interviewed them on the night of the shooting and immediately thereafter.

Somonn In stated that a couple of days before the shooting, Mr. Noy said "he believed he was going to have to get a gun to protect himself" because he believed appellant was going to come after him and possibly shoot him. Mr. In said he was in the Blazer with It Chey, and they went to the apartment complex on April 25th because Mr. Noy asked them. Mr. In heard a cracking noise on the side of the vehicle, he looked to his left, and he saw a person standing in the middle of the street and somewhat to the left of the Blazer. Mr. In believed this person was holding a rifle based on the manner in which he held his hands. Mr. In did not state that someone shot at them, the shooter wore a brown cap, or he heard three shots after the first shot. Mr. In did not state that he heard someone yell before the shots were fired, that Mr. Noy turned after the person yelled, or

he saw the shooter run away. Mr. In said Mr. Chey pulled away from the building immediately after the shots stopped. They drove around the block and returned to the apartment building just as the police arrived.

Rann Phan said she saw appellant at Mr. Noy's apartment building between 3:00 p.m. and 5:00 p.m. that day. Appellant said he was looking for Mr. Noy and needed to talk to him right away. She did not say that appellant came to her apartment five times, that appellant threatened her, or that appellant looked inside her apartment.

Lisa Yim was also interviewed by Detective Stokes, but she did not say that appellant had threatened to kill Mr. Noy or the children, or that appellant sent her threatening letters. Lisa's mother did not state that appellant threatened to kill Lisa or the children.

Sitha Yith stated he did not see who fired the first shots, but he saw three to five young Cambodian males jump inside a blue Honda. Mr. Yith did not see appellant in the car, but one of the occupants extended his hand and fired a gun into the air two or three times.

Kathy Sao said that Lisa was afraid of appellant because he threatened her. Ms. Sao refused to tell appellant where Lisa was because Lisa was afraid of him. Appellant became upset and made some threats about the family trying to protect Lisa, and said: "'You better watch your backs.'" At 9:00 p.m. on April 25th, appellant appeared at Ms. Sao's apartment and said he was looking for Lisa, and he was going to shoot her for what she did with the neighbor. Ms. Sao said appellant appeared very upset and was frantically looking for Lisa, but he didn't say that he was looking for Mr. Noy and didn't threaten Mr. Noy. Ms. Sao did not say that appellant asked her husband for a gun.

Issues on Appeal

On appeal, appellant contends the trial court improperly responded to his request to hire retained counsel because it asked his court-appointed attorney to investigate his financial ability to hire an attorney. Next, appellant contends the court improperly

instructed the jury that the intent to kill was an element of voluntary manslaughter. Appellant also contends the court had a sua sponte duty to instruct on implied malice second degree murder as a lesser included offense, based on appellant's statements to Ms. Torres that he was just trying to scare Mr. Noy and didn't intend to kill him. Appellant asserts the prosecutor committed prejudicial misconduct during closing argument by appealing to the jurors' sympathy for the victim, asking for retribution against appellant, and making negative comments on appellant's demeanor. Finally, appellant contends the mandatory imposition of the term of 25 years to life for the firearm enhancement constitutes cruel or unusual punishment under the California Constitution.[7]

DISCUSSION

I.

DENIAL OF MOTION TO HIRE RETAINED COUNSEL

Appellant's first issue is based on a sequence of events which began when he made a series of unsuccessful *Marsden* motions. Appellant then moved for a continuance to hire retained counsel, which the court also denied. Appellant contends the court forced his appointed counsel into a conflict of interest when it asked counsel to contact appellant's family and determine whether he had the financial resource to hire retained counsel. Appellant asserts this conflict resulted in the denial of his right to effective assistance of counsel, and the denial was prejudicial because the court prevented him from hiring an attorney and forced him to go to trial with appointed counsel.

A. The *Marsden* Motions

Appellant was initially represented by the public defender's office. However, the public defender declared a conflict and the court appointed Carrie McCreary, of Barker

[7]Appellant's brief raises his claims in a different order, but we will address his issues based on the procedural sequence of the case.

and Associates, to represent appellant. Mark Broughton of Barker and Associates subsequently assumed representation.

On June 19, 2002, appellant's trial began with jury selection and motions in limine. The court confirmed that appellant had rejected the prosecution's offer to plead guilty to voluntary manslaughter for a term of 22 years. Appellant asked to address the court. The court advised appellant to talk things over with his attorney. Appellant replied there were conflicts in the police reports. The court explained that defense counsel would raise these conflicts during the trial, and the jury would decide the credibility of witnesses. Appellant complained his paperwork had been lost, he didn't have certain documents from the case file, and he didn't have the most recent version of the complaint. The court again advised appellant to speak with defense counsel about these matter, and continued with the motions in limine.

The court completed the motions and asked if there was anything else to consider. Appellant again asked to address the court, and said there were conflicting statements in the police reports. Defense counsel advised appellant not to continue. Appellant ignored him, however, and continued to complain about specific statements in the police reports. The court again explained that defense counsel would raise these inconsistencies before the jury. Appellant said he tried to explain these things to defense counsel but "I don't see nothing to come out. I would like to know if I can get a different attorney, not waive no time." The court found appellant was making a motion to discharge appointed counsel pursuant to *People v. Marsden, supra,* 2 Cal.3d 118, and held an in camera hearing.

During the *Marsden* hearing, appellant extensively complained about the police investigation and claimed he was injured while imprisoned in Mexico. Appellant also complained he wasn't the person who killed the victim, and wanted a new lawyer "without waiving any time."

Defense counsel replied he had interviewed appellant five times, he extensively discussed the case with him, he was aware of the inconsistencies in the police reports, appellant had all the documents in the file, and counsel was ready for trial. Counsel stated that appellant didn't understand why he was being tried because he was the wrong person: "He thinks that I have the power to just say that to the court or to the DA and the case will go away. Unfortunately, as this court knows, that's not what happens."

The court denied the *Marsden* motion and found no breakdown in the attorney-client relationship. The court found appellant's complaints involved tactical issues, he was not happy about being tried and wanted to be immediately released, and counsel was ready for trial.

B. <u>Appellant's First Request for Private Counsel</u>

On June 20, 2002, the court reconvened to continue hearing pretrial motions, consider the witness list, and start selecting the jury. Appellant asked to address the court, and said he wanted to call 11 witnesses who were not on the list. Defense counsel replied he had discussed these issues with appellant. Appellant stated he had a conflict of interest with counsel, and "I would like to know if I could waive any time so I can get a new lawyer[?]" The court asked if he wanted the court to appoint another attorney. Appellant replied he wanted "to get one myself."

The court replied they were about to start the trial and begin jury selection, but this was the first time appellant said he wanted to hire his own attorney. The prosecutor stated the county had spent approximately $2,000 in airline tickets for witnesses to appear for the scheduled trial. Appellant replied he didn't feel comfortable because "I got 31 pages of different things that they are overlooking trying to get me on. I don't appreciate that is right." The court noted appellant had never before asked to hire his own attorney, and asked if that was what he wanted now. Appellant replied:

> "No, sir. I've been telling Mr. Broughton about the facts. I've been telling him I want to hire a lawyer. He keeps telling me he's got the case under

> control. In fact, he stated that he said that my sister – that I wanted my sister here. You know, that ain't true.…"

Appellant also complained defense counsel wanted him to "say things I don't want to say," and counsel didn't spend enough time interviewing him about the case.

The prosecutor noted the case was two years old, it had been difficult to find the witnesses, airplane tickets had been purchased for several witnesses, and the People were ready for trial.

The court asked appellant if he had any funds to pay for a private attorney. Appellant replied he had $200 to pay for a consultation, and his family could give him the rest of the money. The court asked if he had talked with his family, and appellant said he didn't have the chance because he didn't have access to the payphone in jail. The court replied that no attorney would take the case and be ready in one week, and it would take that long to even hire an attorney.

The court advised appellant his request was not timely because they were ready for trial, appellant had repeatedly refused to waive time, the prosecutor had located witnesses and arranged their travel, "and I think you're just too late." Appellant again complained about inconsistencies in the police reports, that witnesses said they didn't see anything, and other witnesses should be called. Appellant also complained the situation had changed because defense counsel said some things to him that morning.

The court believed there were two issues: (1) appellant's request to hire private counsel, and whether the request was timely; and (2) another *Marsden* motion. The court decided to conduct another in camera *Marsden* hearing to clarify the situation.

C. The Second *Marsden* Hearing

During the second *Marsden* hearing, appellant claimed defense counsel spoke to him that morning and said that "everybody" knew Somonn In and It Chey were the real suspects but that appellant saw the killing and left for Mexico because he was a witness. Appellant was upset because he wasn't involved in the case and didn't appreciate these

stories. "They still want to put this on me. I have nothing to do with this case." Appellant also complained defense counsel had presented a plea bargain offer to him.

Defense counsel replied he had simply been discussing defense theories with appellant. Defense counsel was concerned about examining witnesses and then having appellant take the stand and say something completely different. Defense counsel was also trying to dissuade appellant from taking the stand and simply reading the police reports. Counsel planned to stipulate to the ballistics report but appellant disagreed and wanted to handle things his own way. Nevertheless, counsel was ready for trial and intended to win.

Appellant declared defense counsel was trying to "railroad" him, he wanted appellant to take the plea bargain, and appellant was never a suspect because no one saw him that night. Appellant also declared Lisa was "out there with three men" and sleeping around. Appellant declared he wanted to "get myself a lawyer and let a lawyer fight for me." Defense counsel advised the court that appellant had been held to answer, there were witnesses who placed him at the scene, and he allegedly confessed to his sister.

The court denied the *Marsden* motion and again found only tactical disagreements between appellant and counsel. The court again noted the main source of conflict was appellant's belief that he shouldn't even appear for trial, but there was sufficient evidence to hold him to answer and they were ready for trial. The court advised appellant that defense counsel had to deal with the incriminating evidence and couldn't just ignore it. "… I think that your disagreement that you have and, certainly, I can't say this for sure, but I think these disagreements will probably occur no matter what lawyer you have, okay?"

D. <u>Appellant's Second Request for Retained Counsel</u>

The court reconvened the proceedings and advised the prosecutor that the *Marsden* motion was denied, but asked him to research the question of granting a continuance to allow appellant to hire retained counsel. The prosecutor asked if appellant

had $20,000 to hire an attorney to handle a first degree murder case, because "we're spinning our wheels" if he didn't have the money. The prosecutor also noted appellant had caused the two-year delay because he had been hiding in Mexico. The prosecutor was greatly concerned about whether he could again subpoena some of the witnesses because they had been difficult to find.

The court asked appellant if he had a substantial amount of money to hire an attorney to handle the entire case. Appellant said his aunts and uncles had restaurants in Washington, and they would give him money. Appellant had not spoken to them but he would have his family contact them. The court asked if he knew his family would give him the money. Appellant replied that he assumed they would because they were family.

The court ordered a short recess for the parties to research appellant's request for a continuance. The court advised appellant:

> "… I think you have very good counsel and you may be making an erroneous decision here in terms of trying to jettison your attorney. That's mistake number one you may be doing. If you bring a tardy request—certainly, you have the absolute right to hire your own attorney in this case. The question is, when it is tardy you lose that right, okay? [¶] The second thing is you may be getting rid of a very good attorney, and, third of all, you're going to have to waive time because no attorney is going to be ready. [¶]…[¶] Two or three weeks to probably retain an attorney, especially if you have to communicate with relatives out of state, they have to come up with money, ship it here. You have to consult with somebody, then that attorney comes on board say in two to three weeks. That would be the optimistic. Then they're going to say, judge, we may need a month, two month, three months to get ready."

Appellant said he was willing to waive time.

The prosecutor objected and said there was no cause for continuance, no evidence appellant had any financial resources to hire an attorney, and suggested someone call appellant's family to determine if they had the money. Appellant said he would call his mother, and the court ordered him to have telephone privileges.

After a short recess, the prosecutor again objected to any continuance. While the airline tickets were refundable, it would be difficult to locate the witnesses. In addition, appellant failed to show good cause for a continuance and that he could afford to hire an attorney. Appellant said he spoke to his sister, and she was going to call his uncle. His sister thought "it would be likely" that his family would provide the money. The prosecutor asserted appellant had the burden of proving good cause and he should have to produce someone to confirm this claim. The court asked appellant to have his mother appear at the hearing.

The court's tentative ruling was to deny appellant's request for a continuance because it was not timely, appellant had not expressed any previous interest in hiring an attorney, and his request was based on dissatisfaction with appointed counsel about tactical issues. The trial had been delayed for two years while appellant evaded arrest, it would be further delayed while appellant tried to hire an attorney, and it would be difficult to locate witnesses if it was again delayed.

> "For all those reasons, the tardiness of the – of the request, there's been no showing that [appellant] has any money of his own, he is depending on relatives to supply the money, and there's been no showing before this court that his family has any ability at all to procure the funds that would be necessary to retain private counsel.
>
> "I'll allow you to make that further attempt, if you wish. I'll allow you one more phone call before we break, if you wish to have your mother here so she can speak directly to the court, but, at this time, absent something that – I'm not sure even if your mother says to this court that she could have the money here in a very—very quick period of time, if that would change the court's opinion."

The court suggested defense counsel call appellant's mother instead. Defense counsel agreed but he only had the sister's telephone number and appellant wouldn't disclose his mother's number. The court directed counsel to call appellant's sister and advise her about the situation. The court again told appellant to have his mother appear that afternoon, and appellant said he would try.

The court reconvened that afternoon and defense counsel stated: "Well, I did as the court asked me and made the phone call. I'm in the position of presenting information to the court that might not be of benefit to my client, but the court did ask me to do that, so I did, not having the phone number of his mom." Defense counsel spoke to appellant's sister, who stated she tried to raise $20,000 to hire an attorney but was unable to. The sister also provided the mother's telephone number. Appellant's mother only spoke Spanish, so counsel had his investigator call her.

The defense investigator appeared in court, and reported that he spoke with appellant's mother and explained the situation. Appellant's mother said she didn't have any money to hire a private attorney. She confirmed there was an uncle in Washington with a restaurant, but his business wasn't going well and they wouldn't be able to afford a private attorney.

The court denied appellant's motion for a continuance to hire a private attorney, and found his motion was untimely, interfered with the orderly administration of justice, appellant had failed to make any efforts to retain an attorney, and he lacked any financial resources. The court noted that appellant claimed his mother was going to obtain financial resources, but appellant's mother stated they didn't have any money, "and that may be a reason why you did not want [defense counsel] to have the telephone number of your mother."

Appellant's mother suddenly arrived in the courtroom. The court asked if her family had the financial ability to retain private counsel. Mrs. Torres replied: "I can't. There's no reason for me to lie to you. We don't have the money." "All of my family is poor. We don't have any money." The court asked about the uncle in Washington. Mrs. Torres had talked to him but he didn't have any money either. The court again denied the motion. Appellant did not make any further requests for *Marsden* motions or to hire an attorney.

E. Analysis

Appellant relies on this lengthy sequence and contends the court violated his right to effective assistance of counsel by having his court-appointed attorney contact his family to determine his financial circumstances. Appellant asserts this created a conflict of interest which resulted in the denial of his right to effective assistance of counsel because the court made his appointed counsel "serve two masters: the client and the court." Appellant asserts the court's order interfered with appointed counsel's duty of loyalty because he disclosed information which was harmful to appellant and the conflict was prejudicial because he did not obtain "private representation or its equivalent."

"… In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687-688.) Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Avena* (1996) 12 Cal.4th 694, 721.)" (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1008.)

A criminal defendant's right to effective assistance of counsel, guaranteed by both the state and federal Constitutions, includes the right to representation free from conflicts of interest. (*Wood v. Georgia* (1981) 450 U.S. 261, 271; *People v. Jones* (1991) 53 Cal.3d 1115, 1134; *People v. Bonin* (1989) 47 Cal.3d 808, 834.) "Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a

client are threatened by his responsibilities to another client or a third person or by his own interests." (*People v. Bonin, supra*, at p. 835.)

"… To establish a violation of the right to unconflicted counsel under the federal Constitution, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' (*Cuyler* v. *Sullivan* (1980) 446 U.S. 335, 348, fn. omitted.) To establish a violation of the same right under our state Constitution, a defendant need only show that the record supports an 'informed speculation' that counsel's representation of the defendant was adversely affected by the claimed conflict of interest. (*People* v. *Cox* (1991) 53 Cal.3d 618, 654; *Maxwell* v. *Superior Court* (1982) 30 Cal.3d 606, 612-613.)" (*People v. Kirkpatrick, supra,* 7 Cal.4th at p. 1009.)

Where a possible conflict of interest exists, the trial court must inquire into the circumstances of the potential conflict and take "whatever action may be appropriate." (*People v. Frye* (1998) 18 Cal.4th 894, 999.) A conviction will be reversed for the trial court's failure to satisfy its duty of inquiry only where the defendant demonstrates an actual conflict existed and that conflict adversely affected counsel's performance. (*Ibid.*; *People v. Bonin, supra*, 47 Cal.3d at pp. 837-838.) Appellant must demonstrate that the conflict of interest prejudicially affected his counsel's representation. (*People v. Clark* (1993) 5 Cal.4th 950, 995.)

Appellant's claims of conflict and prejudice are specious given the entirety of the record. Appellant's request to hire retained counsel was clearly based on his frustration with the court's denial of his two *Marsden* motions. Indeed, appellant repeatedly declared he should not be forced to stand trial because of numerous inconsistencies in the police reports. Appellant moved for a continuance and asked to hire his own attorney, and declared his mother and uncle would provide the requisite funds to pay the attorney. The prosecutor properly demanded a more reliable evidentiary showing to support appellant's request for a continuance. Defense counsel was clearly uneasy to contact

appellant's family, and appellant refused to even provide his mother's telephone number, but counsel ultimately complied with the court's request. Counsel and his investigator spoke to appellant's sister and mother, and informed the court that appellant's family did not have sufficient funds to hire an attorney. The court denied appellant's motion.

Appellant asserts there was a prejudicial conflict because counsel disclosed unfavorable information to the court, the court denied his motion, and he was thus prevented from hiring an attorney to represent him at trial. Appellant's assertions of prejudice are essentially rendered moot, however, by the belated appearance of appellant's mother at the hearing. Indeed, appellant fails to even acknowledge that his mother appeared at the hearing and independently declared her family didn't have any money to hire an attorney. The court carefully questioned appellant's mother, asked about the uncle, and was clearly willing to reconsider the motion based on her responses. Thus, the court's denial of appellant's motion for a continuance, and his inability to hire an attorney, were based on his mother's statements in court and not counsel's investigation. In addition, there is no evidence the purported conflict affected counsel's representation of appellant. Counsel vigorously cross-examined the witnesses and brought forth their prior inconsistent statements, but was hampered in his efforts by appellant's trial testimony, in which he insisted that he never stalked Mr. Noy and he left for Mexico just hours before the shooting.

Appellant relies on *People v. Kirkpatrick, supra*, 7 Cal.4th 988, and argues the court created a conflict similar to the situation in that case. In *Kirkpatrick*, defendant argued counsel was prejudicially ineffective because he opposed defendant's motion to represent himself at the penalty phase of a capital case. *Kirkpatrick* agreed "in principle" that defense counsel "should refrain from formally opposing their clients' motions for self-representation" because it undermines trust and makes subsequent representation more difficult. (*Id.* at p. 1010.)

> "This is not to say that defense counsel must suppress misgivings and actively support the motion for self-representation, or even that counsel must remain silent. Without formally opposing self-representation, counsel can assist the court and serve the clients best interests by advising the client of the risks and disadvantages of self-representation; by providing the trial court, upon request, with relevant nonprivileged information and pertinent legal authority; and by correcting any misstatement of fact by the client. [Citation.]" (*People v. Kirkpatrick, supra*, 7 Cal.4th at p. 1010.)

Kirkpatrick found no prejudice, however, because the court granted defendant the status of cocounsel, and he was able to cross-examine each of the prosecution's witnesses and make his own argument to the jury. The court thus found defendant failed to show a reasonable probability of a more favorable penalty phase verdict if counsel had not opposed his motion to represent himself. The court also found defense counsel did not have a prejudicial conflict of interest simply based on an appointed-counsel's financial state in preserving his appointment. (*People v. Kirkpatrick, supra,* 7 Cal.4th at pp. 1008-1010.)

In contrast to *Kirkpatrick*, defense counsel herein did not actively oppose appellant's request for a continuance to hire an attorney. While counsel may have been placed in a difficult situation, he did not violate any privileges or play a role in the court's decision to deny appellant's motion. Indeed, the court realized appellant refused to provide them with his mother's telephone number because her statements differed from appellant's representations about her alleged financial support. We thus conclude that to the extent the court's request created a potential conflict, the purported conflict was not prejudicial given the entirety of the record.

II.

VOLUNTARY MANSLAUGHTER INSTRUCTIONS

The court instructed the jury as to voluntary manslaughter as a lesser included offense of murder (CALJIC Nos. 8.37, 8.40). The instructions defined two theories of voluntary manslaughter: (1) sudden quarrel or heat of passion (CALJIC No. 8.42), and

(2) unreasonable self-defense (CALJIC No. 5.17). The court also instructed on justifiable homicide in self-defense as a complete defense (CALJIC No. 5.12).

Appellant asserts that CALJIC No. 8.40 incorrectly stated the intent to kill was an element of voluntary manslaughter. Appellant asserts the erroneous instruction violated his due process rights and requires reversal of his first degree murder conviction. Respondent concedes the intent to kill element should have been deleted from this instruction, but asserts any error is harmless.

Criminal homicide is divided into two classes: the greater offense of murder and the lesser included offense of manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Manslaughter is the unlawful killing of a human being without malice, and is divided into three classes: voluntary, involuntary, and vehicular. (§ 192.)

Voluntary manslaughter is a lesser included offense of murder. (*People v. Lasko* (2000) 23 Cal.4th 101, 111 (*Lasko*).) "… A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' [citation], or when the defendant kills in 'unreasonable self-defense'—the unreasonable but good faith belief in having to act in self-defense [citations].'" (*Id.* at p. 108; § 192, subd. (a).) It was previously held that the intent to kill was an essential element of voluntary manslaughter. (See *People v. Blakeley* (2000) 23 Cal.4th 82, 89 (*Blakeley*).) CALJIC No. 8.40, which defined voluntary manslaughter, stated that intent to kill was an element of the offense. (CALJIC No. 8.40 (2001 rev.) (6th ed. 1996).)

In *Blakeley, supra*, 23 Cal.4th at pp. 90-91, and *Lasko*, *supra*, 23 Cal.4th at pp. 108-110, the California Supreme Court held that voluntary manslaughter does not require an intent to kill. Voluntary manslaughter is committed when one kills unlawfully and with conscious disregard for life, but lacks malice because of provocation or imperfect self-defense. (*Blakeley, supra*, 23 Cal.4th at pp. 90-91; *Lasko, supra*, 23 Cal.4th at pp.

108-110; see also *People v. Rios, supra*, 23 Cal.4th at p. 461, fn. 7; *People v. Johnson* (2002) 98 Cal.App.4th 566, 568-569.) *Lasko* held:

> "[A] killer who acts in a sudden quarrel or heat of passion lacks malice and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill. Just as an unlawful killing *with* malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill. In short, the presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter." (*Lasko, supra*, 23 Cal.4th at pp. 109-110.)

Lasko also held:

> "When a killer *intentionally* but unlawfully kills in a sudden quarrel or heat of passion, the killer lacks malice and is guilty only of voluntary manslaughter. We hold here that this is also true of a killer who, acting with conscious disregard for life and knowing that the conduct endangers the life of another, *unintentionally* but unlawfully kills in a sudden quarrel or heat of passion." (*Lasko, supra*, 23 Cal.4th at p. 104.)

Blakeley similarly concluded:

> "[W]hen a defendant, acting with a conscious disregard for life, unintentionally kills in unreasonable self-defense, the killing is voluntary rather than involuntary manslaughter.... [¶] …[A] defendant who, *with the intent to kill or with conscious disregard for life*, unlawfully kills in unreasonable self-defense is guilty of voluntary manslaughter." (*Blakeley, supra*, 23 Cal.4th at p. 91.)

Lasko did not establish a new rule of law, but rather "gives 'effect to a statutory rule that the courts had theretofore misconstrued ….' [Citation.]" (*People v. Crowe* (2001) 87 Cal.App.4th 86, 95.) *Lasko* is thus retroactive and applies to cases in which the alleged criminal conduct occurred before the case was decided on June 2, 2000. Therefore, regardless of the date of the charged offense, it is error to instruct the jury that voluntary manslaughter requires a finding that the killing was done with the intent to kill. (*Lasko*, *supra*, 23 Cal.4th at p. 111; *People v. Crowe, supra*, at pp. 93-95.) CALJIC No. 8.40 has been revised accordingly and now includes, as a required element of voluntary

manslaughter, proof that "… [t]he perpetrator of the killing either intended to kill the alleged victim, or acted in conscious disregard for life." (CALJIC No. 8.40 (2001 rev.) (6th ed. 1996).)

In the instant case, the court improperly instructed the jury with the pre-*Lasko* version of CALJIC No. 8.40, which included the intent to kill as an element of voluntary manslaughter. Appellant was charged with murdering Ny Noy on April 25, 2000, just two months before the Supreme Court's decision in *Lasko*, and his trial occurred in June 2002. The trial court acknowledged the holdings in *Lasko* and *Blakeley*, and realized that CALJIC No. 8.40 had been revised, but erroneously believed *Lasko* was not retroactive and the revised instruction only applied if the offense occurred after *Lasko* was decided. Neither appellant nor the prosecutor objected to the court's decision, and both parties had actually requested the pre-*Lasko* version of CALJIC No. 8.40.

The jury thus erroneously received the pre-*Lasko* version of CALJIC No. 8.40 as follows:

> "Every person who unlawfully kills another human being without malice aforethought but with *an intent to kill*, is guilty of voluntary manslaughter in violation of Penal Code section 192(a). [¶] There is no malice aforethought if the killing occurred [upon a sudden quarrel or heat of passion] [or] [in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury].] [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The killing was done with *the intent to kill*." (Italics added.)

The trial court should have given the revised version of CALJIC No. 8.40 or deleted the references to an intent to kill as an element of voluntary manslaughter.[8]

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[8]"The precise holding in *Blakeley,* on the other hand—that one who, acting with conscious disregard for life, unintentionally kills in unreasonable self-defense is guilty of voluntary manslaughter rather than the less serious crime of involuntary manslaughter—constitutes an 'unforeseeable judicial enlargement of the crime of voluntary manslaughter

Respondent concedes the court should have given the revised instruction but argues the error is harmless. Appellant asserts the error is prejudicial because there was evidence which would have supported a voluntary manslaughter verdict, and the jury was prevented from returning that verdict because it was erroneously instructed that the intent to kill was an element of the offense. Appellant also asserts the error is of federal constitutional dimensions and requires the application of the stricter standard of *Chapman v. California* (1967) 386 U.S. 18.

Lasko rejected the defendant's claim the instructional error violated his federal constitutional rights, and found instead the error was subject to review under the state constitutional standard as articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Lasko*, *supra*, 23 Cal.4th at pp. 111-113.) We thus reject appellant's claim that the *Chapman* standard applies, and must review the instructional error based on the *Watson* standard. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Lasko held reversal is required only if it appears reasonably probable the defendant would have obtained a more favorable outcome if correct instructions on voluntary manslaughter had been given which omitted the intent to kill as an element of the offense. (*Lasko*, *supra*, 23 Cal.4th at pp. 111-113; *People v. Crowe, supra,* 87 Cal.App.4th at p. 96.) *Lasko* deemed the instructional error harmless in that case for three reasons: (1) the jury was given CALJIC No. 8.50, which made it clear that even an intentional killing is manslaughter if committed in the heat of passion or in a sudden quarrel, and that the burden is on the prosecution to disprove those conditions; (2) neither

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and thus may not be applied retroactively.' [Citation.]" (*People v. Johnson, supra*, 98 Cal.App.4th at p. 569.) *Johnson* also suggested that *Lasko* may not be retroactively applied when there is substantial evidence of both reasonable provocation and imperfect self-defense. (*Id.* at p. 577, fn. 13.) We will not address this issue given respondent's tacit concession that the court should have given the revised version of CALJIC No. 8.40.

side emphasized voluntary manslaughter during closing argument; and (3) the evidence strongly suggested an intent to kill. (*Lasko*, *supra*, at pp. 111-113; *People v. Crowe, supra*, at pp. 96-97.)

As in *Lasko*, it is not reasonably probably that a result more favorable to appellant would have occurred in this case if the jury had been given the revised version of CALJIC No. 8.40. First, the jury received CALJIC No. 8.50, which distinguished that murder requires malice while manslaughter does not. This instruction also stated:

> "[¶]…[¶] When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation,] [or] [in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,] the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.
>
> "To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel] [or] [in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury]."

Thus, as in *Lasko*, the jury herein was told that regardless whether the killing of the victim was intentional or unintentional, appellant could not be convicted of murder unless the prosecution proved that, at the time of the killing, appellant was *not* acting in the heat of passion or imperfect self-defense. (*Lasko*, *supra*, 23 Cal.4th at pp. 111-112.)

Second, our extensive review of closing argument reveals that voluntary manslaughter was not emphasized by either side. The prosecutor argued there was overwhelming evidence of first degree murder, malice, and an intent to kill. The prosecutor briefly discussed the two theories of voluntary manslaughter, explained the concept of lesser included offenses, and tried to anticipate defense counsel's possible arguments as to unreasonable self-defense or provocation. Defense counsel, however, never discussed voluntary manslaughter—or any other lesser included offense—as a

possible verdict. Instead, counsel argued the prosecution failed to meet its burden of proof that appellant was the shooter, the reasonable inferences from the circumstantial evidence supported a finding of innocence, and the witnesses who placed appellant at the scene gave inconsistent statements and had motives to lie. Defense counsel suggested Somonn In, Sitha Yith, and It Chey were really the culprits in this case, Mr. Noy's three friends might have believed appellant was in the vicinity that night, and they fired at a car or a shadowy figure and accidentally hit Mr. Noy.

Appellant's closing argument thus focused on the prosecution's alleged failure to meet the burden of proof, and asserted he was innocent based on the witnesses's inconsistent statements and motives to lie. Appellant never asked the jury to return a verdict on voluntary manslaughter or any lesser offense. (*Lasko*, *supra*, 23 Cal.4th at p. 112.) Indeed, the prosecutor noted as much in his rebuttal argument:

> "Let me tell you what you did not hear in the defense closing. You did not hear one argument, not one, that this was a voluntary manslaughter because of heat of passion or imperfect self-defense. That was not even argued to you. And why? It's because the facts don't let you argue that."

Third, there is overwhelming evidence of appellant's intent to kill Mr. Noy. Appellant was still in New Mexico when he learned of Lisa's alleged infidelity, and wrote her two letters and threatened to kill Mr. Noy. As soon as he returned to Fresno in April 2000, appellant hunted for Lisa and Mr. Noy. During the week preceding the killing, appellant accused family and friends of hiding Mr. Noy, Lisa, and the children, and repeatedly vowed to kill them when he found them. Appellant called Mr. Noy's wife, informed her of the alleged affair, and threatened to kill him. Appellant told Kathy Sao that he would find the person who was having an affair with Lisa and kill him. Appellant later asked Kathy Sao's husband for a gun.

On the afternoon of April 25th, appellant was repeatedly seen around Mr. Noy's apartment building, searching for him and making threats against him. He told Mr. Noy's wife that he wanted to kill him. He repeatedly went to Rann Phan's apartment, in

the same building as Mr. Noy's residence, and angrily accused her of hiding Mr. Noy. Appellant's last visit to Rann Phan's apartment occurred around 6:00 p.m., and she testified that he looked like he was going to kill someone.

Mr. Noy told his friends that fateful evening that appellant was going to meet him, and asked his friends to stay because he was afraid appellant was going to hurt him. When appellant failed to appear, Mr. Yith walked across the street to his own apartment and passed appellant sitting on the stairwell. The fatal shots were fired 15 minutes later. Mr. Noy was shot in the back as he walked away from South Dearing Street, where the seven .22-caliber casings were recovered. Appellant had repeatedly called Mr. Noy the preceding week to harass him about the alleged affair, and reached him via Somonn In's cell phone. The day after the killing, Mr. In received a cell phone call from the same voice, and the caller said he did what he had to do.

Appellant asserts the evidence of intent to kill was not compelling because there was evidence that appellant just wanted to talk with Mr. Noy that night. Appellant also suggests the fatal bullet could have been "purposelessly fired or could have been a stray." These theories are pure speculation when compared to the direct evidence in this case: that appellant spent days searching for Mr. Noy, appellant repeatedly threatened to kill him, appellant arranged a meeting with him that night, appellant was seen across the street from Mr. Noy just 15 minutes before the shooting, and Mr. Noy repeatedly told his friends that he was afraid. There is no evidence that Mr. Noy or his associates threatened or confronted appellant in any way that night, and his friends didn't even know that Mr. Noy had obtained a gun. Indeed, the evidence supports the prosecutor's suggestion that Mr. Noy kept his revolver concealed in the back of his waistband: he was shot in the back, his body was only bloody in the back, he fell face-down on the ground, and the gun was lying behind him and covered with blood. In addition, the police searched Mr. Chey's Blazer that night and did not find any weapons.

Appellant points to Patty Torres's statements on the tape recording as supporting either of the two voluntary manslaughter theories. Ms. Torres told Detective Stokes that appellant did not intend to shoot Mr. Noy but things got out of control, the other men were armed, and appellant was afraid. Appellant notes the trial court found Ms. Torres's statements sufficient to give the voluntary manslaughter instructions, and asserts the instructional error is prejudicial because the jury could have relied on this evidence and returned a manslaughter verdict.

Appellant's reliance on the court's decision to give the voluntary manslaughter instruction is meritless. While the court decided to instruct the jury on the two theories of voluntary manslaughter, this instructional decision does not establish a reasonable probability the jury would have returned a manslaughter verdict in this case if it had been told the offense did not require an intent to kill. The evidentiary threshold for giving an instruction is much less when compared to *Watson*'s standard of establishing reversible error. As the Supreme Court has explained, an instruction on a lesser included offense must be given whenever a reasonable jury could conclude the lesser, but not the greater, offense was committed. The court only determines the bare legal sufficiency of the evidence and not its weight. (*People v. Breverman* (1998) 19 Cal.4th 142, 177.) In contrast, appellate review under *Watson*'s reasonable probability standard "… takes an entirely different view of the evidence. Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. Accordingly, a determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part

was error, does not resolve the question whether the error was prejudicial…." (*Id.* at pp. 177-178.)

The trial court herein properly relied on Detective Stokes's account of Patty Torres's statements to instruct on voluntary manslaughter, even though Ms. Torres later disowned her story.[9] Nevertheless, the statements which she attributed to appellant were equivocal, contradictory, and hardly substantial evidence to support verdicts under either theory of voluntary manslaughter. There was no other evidence that Mr. Noy and his associates planned to threaten or attack appellant in any way. Mr. Noy was well aware of appellant's threats against him, but no one heard any reciprocal threats. Indeed, Mr. Noy apparently believed he could simply talk things over with appellant and clear up the matter. While a .38-caliber revolver was found a few feet from Mr. Noy's body, it was fully loaded, there were no expended casings in the area, it had never been fired, no one ever saw Mr. Noy brandish the gun, and it was probably tucked in the back of Mr. Noy's waistband when he was shot. The court's decision to instruct on voluntary manslaughter does not support appellant's claim that *Watson* error occurred in this case.

Finally, the jury necessarily resolved the factual question of intent to kill against appellant when it returned the verdict for first degree murder with premeditation and deliberation. By finding appellant acted with premeditation and deliberation, the jury necessarily concluded he did not act in the heat of passion, upon a sudden quarrel, or based on unreasonable self-defense. (See, e.g., *People v. Prettyman* (1996) 14 Cal.4th 248, 276.)

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[9]During the instructional phase, defense counsel agreed with the court's decision to instruct on both perfect and imperfect self-defense, but stated "for the record" that appellant did not want such instructions given.

The first degree murder verdict in this case was not attributable to the instructional error, but instead to the fact that the evidence in support of the voluntary manslaughter theories was extremely weak while the evidence of premeditation, express malice, and intent to kill was very strong. (See *Lasko*, *supra*, 23 Cal.4th at pp. 112-113; *People v. Crowe, supra*, 87 Cal.App.4th at p. 97.) We thus conclude it is not reasonably probable that appellant would have been convicted of voluntary manslaughter if the revised version of CALJIC No. 8.40 had been given.

III.

FAILURE TO INSTRUCT ON IMPLIED MALICE

The court instructed the jury on first degree murder, and premeditation and deliberation. (CALJIC Nos. 8.10, 8.20.) The court also instructed on second degree murder as the unlawful killing of a human being with malice aforethought, when the perpetrator intended unlawfully to kill a human being, but the evidence is insufficient to prove deliberation and premeditation. (CALJIC No. 8.30.) The court gave CALJIC No. 8.11 on the definition of malice aforethought. This instruction only defined express malice; the jury was not instructed on implied malice.

Appellant contends the court improperly deleted the definition of implied malice from CALJIC No. 8.11. Appellant asserts this instructional error improperly removed the lesser included offense of implied malice second degree murder from the jury's consideration, and requires reversal of his first degree murder conviction.

Respondent asserts any instruction error was invited because appellant did not request instructions on implied malice murder, appellant did not object to the court's deletion of implied malice from CALJIC No. 8.11, and the record suggests appellant requested the modified instruction.

We first consider respondent's claim of invited error. The invited error doctrine requires the record to show that defense counsel made "a conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the

choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

The record herein is equivocal as to whether defense counsel specifically requested the deletion of implied malice from CALJIC No. 8.11. The pattern instruction contained in the clerk's transcript has checkmarks indicating it was requested by both the prosecution and defense. The implied malice definition is marked out, but there is no indication whether one or both parties requested the modification or the court did so on its own motion. The court did not discuss this modification, or any aspect of implied malice, during the instructional conference. The court noted it was going to give the voluntary manslaughter instructions because "this appears to be an intent to kill case." The court also noted there may be other theories "but I don't see any other theory." Defense counsel noted "for the record" that appellant did not want voluntary manslaughter instructions, but counsel agreed the court should give manslaughter instructions because they were supported by Patty Torres's statements.

We cannot say from this record that defense counsel made the tactical decision to delete the implied malice definition from CALJIC No. 8.11, or decline instructions for implied malice second degree murder as a lesser included offense of first degree murder. In any event, a defendant who is barred from raising instructional error by the invited error doctrine may always claim he or she received ineffective assistance of counsel. (*People v. Wader* (1993) 5 Cal.4th 610, 658.) Therefore, we must look beyond the invited error doctrine back to the trial court's duty to give instructions the general principles of law relevant to and governing the case. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

In a criminal case, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman, supra,* 19 Cal.4th at p. 154.) Therefore, even without a request, the court must instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. (*Ibid.*; *People v. Earp* (1999) 20 Cal.4th 826, 885.) The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. (*People v. Breverman, supra*, at pp. 154-155.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice may be either express or implied. It is express when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*) "… This statutory definition of implied malice, we have said, 'has never proved of much assistance in defining the concept in concrete terms' [citation], and juries should be instructed that malice is implied 'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life' [citation]." (*Blakeley, supra*, 23 Cal.4th at p. 87.)

A willful, deliberate, and premeditated killing with express malice aforethought is murder of the first degree. (§ 189.) "'[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.] The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated

judgment may be arrived at quickly ....' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) Evidence concerning motive, planning, and the manner of killing are pertinent to the determination of premeditation and deliberation, but these factors are not exclusive nor are they invariably determinative. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126; *People v. Silva* (2001) 25 Cal.4th 345, 368.)

Second degree murder is the unlawful killing of a human being with malice aforethought, but without the premeditation, deliberation and willfulness necessary to elevate the offense to first degree murder. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 368.) "Express malice murder requires an intent to kill. [Citations.] Implied malice murder requires 'an intent to do some act, the natural consequences of which are dangerous to human life. "When the killing is the direct result of such an act," the requisite mental state for murder—malice aforethought—is implied.' [Citation.]" (*Ibid*.) Therefore, "second degree murder with implied malice has been committed 'when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104; *People v. Earp, supra*, 20 Cal.4th at p. 885.)

Appellant argues the court should have instructed on the implied malice theory of second degree murder as a lesser included offense of first degree murder. Appellant asserts Patty Torres's statements to Detective Stokes would have supported an implied malice theory because he only went to the apartment building to confront Mr. Noy and did not intend to kill him. Appellant again suggests that Mr. Noy might have been caught in the cross-fire started by his own friends, who thought they were shooting at appellant.

Patty Torres's account of the shooting, purportedly based on appellant's admissions to her, depicted a scenario in which appellant just wanted to talk with Mr. Noy but was confronted by the victim's associates, who were armed with guns, pipes, and brass knuckles, that appellant was by himself and scared, and he didn't mean to kill

Mr. Noy. While this account supported the voluntary manslaughter instructions, it could be argued that it might have supported implied malice murder instructions—that appellant's act of carrying a gun and discharging it during his meeting with Mr. Noy was not indicative of an intent to kill, but the intent to do some act, the natural consequences of which were dangerous to human life.

Even if the court should have given implied malice instructions, however, any error is necessarily harmless in this case. In a noncapital case, the court's failure to sua sponte instruct on all lesser included offenses supported by the evidence is reviewed for prejudice exclusively under the *Watson* standard. (*People v. Breverman, supra*, 19 Cal.4th at p. 178.) The failure to instruct on the implied malice theory of second degree murder, as a lesser included offense, is not prejudicial if it is not reasonably probable the error affected the verdict. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Coddington* (2000) 23 Cal.4th 529, 592-594, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

The jury herein convicted appellant of first degree murder—that he acted willfully, deliberately, and with premeditation. The jury was instructed that "premeditated" meant "considered beforehand," "deliberate" meant "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action," and "willful" meant "intentional." (See CALJIC No. 8.20.) The entire basis of appellant's prejudice argument is that the jury never had a chance to consider implied malice. But implied malice does not require an intent to kill. (*People v. Swain* (1996) 12 Cal.4th 593, 602-604.) As discussed in section I, *ante*, there is overwhelming evidence of appellant's intent to kill in this case. There is also overwhelming evidence of appellant's premeditation and deliberation based on his oft-stated motive (revenge for Mr. Noy's purported affair with Lisa), planning activities (several days spent hunting for Mr. Noy, trying to get a gun, and finally arranging a meeting with him at night), and the manner of killing (multiple shots fired at relatively close range, with the fatal shot fired

directly in the back). The jury's finding that appellant acted with premeditation and deliberation is inconsistent with implied malice or not having an intent to kill, and necessarily means it rejected any lesser offense, including second degree murder.

Appellant separately asserts the court's failure to instruct on implied malice is not harmless because the jury was also misinstructed on the elements of voluntary manslaughter, as discussed in section I, *ante*. Appellant notes that *Lasko* found the failure to correctly instruct on voluntary manslaughter was harmless in that case because the jury therein found defendant guilty of second degree murder, it was thoroughly instructed on the difference between voluntary and involuntary manslaughter, and it could have found defendant guilty of involuntary manslaughter if it had any doubt on whether defendant had implied malice. (See *Lasko*, *supra*, 23 Cal.4th at p. 112.) Appellant thus asserts the court's failure to instruct on any theory of implied malice in this case left the jury with no alternative but to convict on first degree murder.

Appellant's reliance on *Lasko* for this argument is misplaced. While the defendant therein was convicted of second degree murder, *Lasko* found the failure to correctly instruct on voluntary manslaughter was harmless because of the presence of CALJIC No. 8.50, which distinguished between murder and manslaughter:

> "… Had the jury believed that defendant unintentionally killed [the victim] in the heat of passion, it would have concluded that it could not convict defendant of murder (because he killed in the heat of passion) and could not convict defendant of voluntary manslaughter (because he lacked the intent to kill). The jury most likely would have convicted defendant of involuntary manslaughter, a lesser offense included within the crime of murder, on which the jury was also instructed. Instead, the jury convicted defendant of second degree murder, showing that it did not believe the killing was committed in the heat of passion." (*Lasko*, *supra*, 23 Cal.4th at p. 112.)

Lasko also found the instructional error harmless based on the failure of either party to rely on voluntary manslaughter in closing argument, and the overwhelming evidence of an intent to kill. (*Lasko*, *supra*, 23 Cal.4th at pp. 112-113.)

Appellant's argument in this case is that the jury was foreclosed from finding implied malice, i.e., the absence of an intent to kill. As we have already discussed, the entirety of the record contains overwhelming evidence of appellant's intent to kill. In addition, the jury herein was not forced by the instructions into returning a verdict of first degree murder even if it did not believe the killing was premeditated and intentional. The jury was instructed that intent and malice were not synonymous; even if it concluded the killing was intentional, it was only second degree murder if not premeditated and deliberate. (CALJIC No. 8.30.) The jury was also instructed to give appellant the benefit of any doubt as to whether the murder was first or second degree. (CALJIC No. 8.71; see, e.g., *People v. Coddington, supra*, 23 Cal.4th at pp. 592-594.)

Appellant filed a letter brief and cited two cases at oral argument in support of his argument that the implied malice instruction should have been given, and the error is prejudicial under *Watson*. *People v. Martinez* (2003) 31 Cal.4th 673, 686-686, held defendant's prior murder conviction in Texas, based on his guilty plea to knowingly and intentionally shooting a victim, was punishable as second degree murder in California, for purposes of a special circumstance allegation. In *People v. Taylor* (2004) 32 Cal.4th 863, 868-869, defendant shot his girlfriend in the head, and didn't know she was pregnant. He was convicted of murder of his girlfriend, and second degree implied malice murder of the fetus. *Taylor* upheld the convictions, and held that in beating and shooting his girlfriend, defendant acted with knowledge of the danger to and conscious disregard for life in general. "That is all that is required for implied malice murder. He did not need to be specifically aware how many potential victims his conscious disregard for life endangered." (*Id*. at p. 869.)

We have concluded that appellant was entitled to the implied malice instruction, but the error was not reversible under *Watson* because of the overwhelming evidence of premeditation, deliberation, and intent to kill. Neither *Martinez* nor *Taylor* support appellant's claim of *Watson* error.

We thus conclude that even if the court had a sua sponte duty to instruct on the implied malice theory of second degree murder, as a lesser included offense of first degree murder, any error is necessarily harmless.

IV.

PROSECUTORIAL MISCONDUCT

Appellant raises three instances of alleged prosecutorial misconduct based on the prosecutor's rebuttal argument. Respondent contends appellant waived review of this issue by failing to object or request admonitions.

A. Background

As discussed in section II, *ante*, the prosecutor's closing argument focused on evidence of appellant's intent to kill, and he argued there was overwhelming evidence of first degree premeditated murder. Defense counsel asserted the circumstantial evidence was equally supportive of appellant's innocence, the prosecution's witnesses were inconsistent and had motives to lie, and Mr. Noy was likely the victim of a stray bullet fired by one of his friends.

Appellant raises three instances of alleged prosecutorial misconduct based on the final paragraphs of the prosecutor's rebuttal argument. The prosecutor again summarized the evidence that appellant committed premeditated and intentional first degree murder, and there was only one explanation for the evidence. He continued:

> "[THE PROSECUTOR:] I want you to let you go and get to your job. I want to mention something in this case, actually, I'll end with this: Throughout the trial across from me, directly across from you has been [appellant] and his counsel. Over here I've been sitting here through the trial. *Next to me has been an empty chair, actually a couple of them*. I'm pointing that out because you have not and never could hear from Ny Noy in this case. It's easy to forget about Ny Noy, because he's dead. Two and a half years ago he died. He was murdered.
>
> "There's a book that I read recently called the 'Killing of Bonnie Garland, A Question Of Justice.' In the preface to that book, the introduction, there's a paragraph that talks about, for lack of a better word, *of the*

> *injustice that can come around because the victim gets lost in all this*. I'd like to actually read that quote to you because I think it is a powerful and it applies to this case. So, if you'd bear with me, it's fairly short.
>
> "[DEFENSE COUNSEL]: Your Honor, I'm going to object to this portion of the testimony as appealing for sympathies for the victim.
>
> "THE COURT: Sustained. I think it is outside the realm of argument. Sustained.
>
> "[THE PROSECUTOR]: Let me phrase it this way then. Ny Noy might not have been able to walk in this courtroom, go up to that chair and take the same oath everybody else took and told you what happened on April 25th, but he has actually, from the grave, has been able to do that in several ways." (Italics added.)

Appellant's first assignment of error is based on the above-italicized language: he asserts the prosecutor improperly appealed to the jury to have sympathy for the victim, and to have an emotional rather than objective response to the evidence.

Appellant's next assignment of misconduct is based on the prosecutor's comments which immediately followed the above argument.

> "You have heard from various witnesses what Ny Noy was going through in the days leading up to April 25th. *You heard the fact there was this man, [appellant] right over here, the one that keeps staring at me through this trial, who has been smirking throughout the entire case*. This man was even calling his wife making threats. You know what Ny Noy was going through leading up to his murder. You know he was seeing it coming. You know that he was concerned that this person was actually going to carry out the threats he was making to his family and friends that he was going to murder him." (Italics added.)

Appellant's second assignment of error is that this italicized language constituted improper comment on his demeanor.

Appellant's final assignment of misconduct is based on the balance of the prosecutor's rebuttal, which immediately followed the above-quoted portion.

> "Just because [Mr. Noy is] not in this courtroom, just because that man murdered him doesn't mean you don't know from the evidence what was going on with Ny Noy, what led up to his death and who perpetrated it.

> *Whether it was rash or not, you know murder doesn't make a whole lot of sense when you step outside of it and look at it. But, what you know is that this man, this guy right here, because of his beliefs about an affair and his injured pride, made a conscious decision to get a rifle, to go to ... South Dearing, to point that thing at a living, breathing human being named Ny Noy and pull the trigger repeatedly. And you know that because of his choice to make those actions to engage in that conduct, Ny Noy's life ended. It was snuffed out by him, and the evidence in this case cannot take you anywhere else but there. That and that alone is why I'm asking you to return first degree murder ... conviction. There is one verdict*. [¶] I'll let you get to your job. Thank you very much." (Italics added)

Appellant's third assignment of misconduct is that the italicized language constituted an improper appeal for the jury to base its verdict on retribution.

B. <u>Analysis</u>

Appellant asserts the prosecutor committed prejudicial misconduct based on the three separate instances italicized above. Appellant also asserts the entirety of the prosecutor's rebuttal argument demonstrated his "larger and more insidious plan to incite the jurors to convict [appellant] of first degree murder because he had been threatening persons, and sneering at trial, and had shot Mr. Noy," which began by the appeal for sympathy.

Although a prosecutor's misstatement or mischaracterization of evidence or reference to facts not in evidence constitutes misconduct (*People v. Hill* (1998) 17 Cal.4th 800, 823-829), during closing argument counsel is accorded wide latitude to urge whatever conclusions can properly be drawn from the evidence. (*People v. Thomas* (1992) 2 Cal.4th 489, 526.) A prosecutor is entitled during argument to make reasonable deductions from the evidence and to draw reasonable inferences from the testimony, and is not limited to """"Chesterfieldian politeness."""" (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

> "The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the

> conviction a denial of due process.’”’ [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ‘“‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’”’ [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

It is thus well-settled that a claim of prosecutorial misconduct is generally reviewable on appeal only if the defense makes a timely objection at trial and asks the trial court to admonish the jury to disregard the prosecutor’s question. (*People v. Sapp* (2003) 31 Cal.4th 240, 279.) Defendant’s failure to object or request an admonition is excused if either would be futile or an admonition would not have cured the harm caused by the misconduct. (*People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Earp, supra,* 20 Cal.4th at p. 858.)

Appellant acknowledges defense counsel only objected to the first alleged instance of misconduct but did not request an admonition; he did not object or request admonitions to any other aspect of rebuttal argument. Appellant asserts admonitions would not have cured the misconduct because the prosecutor made multiple and repetitive appeals to the jury’s passion, and these improper appeals “continued even after the first objection was sustained.”

The prosecutor’s rebuttal argument at issue was neither outrageous nor shocking, and admonitions would have been adequate to cure the harm, if any, from his comments. In addition, the trial court said nothing to suggest that objections or requests for admonitions would have been futile, and immediately sustained defense counsel’s only objection to the prosecutor’s rebuttal argument. Therefore, appellant’s failure to object

and request admonitions has forfeited his right to appellate review. (*People v. Cox* (2003) 30 Cal.4th 916, 966; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072, disapproved on other grounds in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1.) In the alternative, appellant argues defense counsel was prejudicially ineffective for failing to object and request such admonitions to the rebuttal argument. We will therefore address appellant's arguments on the merits given his claim of ineffective assistance. (*People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

Appellant raises three claims of prosecutorial misconduct: (1) appeals for sympathy for the victim, (2) comments on appellant's demeanor, and (3) appeals for retribution against appellant. As for the first basis, it is well established that an appeal for sympathy for the victim is inappropriate during an objective determination of guilt. (*People v. Fields* (1983) 35 Cal.3d 329, 362.) But the prosecutor's remarks herein were relatively brief and merely purported to ask on the victim's behalf for a fair verdict, and the court immediately sustained defense counsel's objection. These "brief and relatively bland" references were not misconduct. (Cf. *People v. Sanders* (1995) 11 Cal.4th 475, 527.)

As for comments on appellant's credibility and demeanor, the prosecutor is permitted to urge, in colorful terms, that defense witnesses—including a testifying defendant—are not entitled to credence, and to argue on the basis of inference from the evidence that a defense is fabricated. (*People v. Earp, supra*, 20 Cal.4th at pp. 862-863.) Appellant relies on *People v. Heishman* (1988) 45 Cal.3d 147, and argues the prosecutor's references to his smirks and stares were improper. *Heishman* held that "prosecutorial references to a *nontestifying* defendant's demeanor or behavior in the courtroom" are "improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's

behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character." (*Id.* at p. 197, italics added.)

Since appellant testified, however, the argument at issue was only improper based on the third factor set forth in *Heishman*. If the prosecutor suggested the jury should convict appellant based on his courtroom demeanor, he then committed misconduct. But it is difficult to reach such a conclusion from this brief reference to his demeanor. Of course, appellant's decision to testify at trial reduced any potential harm to his Fifth Amendment rights from this argument. (See, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 434-435.) Appellant's credibility was undermined not by the prosecutor's comments on his demeanor, but through his trial testimony that all the prosecution witnesses were lying about his repeated threats against Mr. Noy, he was not near the apartment building just before the murder, and he happened to leave for Mexico just hours before Mr. Noy was murdered.

> "… When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Berryman, supra,* 6 Cal.4th at p. 1072.)

On the record here, the answer is no. The court instructed the jury that statements by attorneys are not evidence. (CALJIC No. 1.02.) Since we presume that the jury followed the court's instructions, no reasonable likelihood exists that the prosecutor's comments misled the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 961.) Even if the prosecutor's brief comments on his demeanor were improper, they were neither deceptive or reprehensible.

Appellant claims the prosecutor's final rebuttal comments appealed to the jury to return a verdict based on retribution against appellant. In the context of capital cases, the California Supreme Court has held: "Isolated, brief references to retribution or community vengeance ..., although potentially inflammatory, do not constitute

misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty." (*People v. Ghent* (1987) 43 Cal.3d 739, 771.) In *People v. Wash* (1993) 6 Cal.4th 215, the court rejected defendant's claim of misconduct based on the prosecutor's argument in which he urged the jury "'to make a statement,'" to do "'the right thing'" and to restore "'confidence'" in the criminal justice system by returning a verdict of death. (*Id.* at pp. 261-262.)

In light of *Wash*, the prosecutor's comments herein were neither inflammatory nor the principal basis of his argument in favor of a first degree murder verdict. The prosecutor did not use deceptive or reprehensible methods to attempt to persuade the jury, and his comments did not render the trial fundamentally unfair. In any event, the jurors were instructed that they "must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," and that, if the attorneys said anything during their arguments that conflicted with the court's instructions, the jurors must follow the instructions. (CALJIC No. 1.00.) We presume they did so, and appellant was not prejudiced by the prosecutor's comment.

Appellant attempts to claim ineffective assistance based on the argument that the prosecutor engaged in a pattern of improper argument which was prejudicial and could not have been mitigated by objection or admonition. These brief instances of claimed misconduct could have easily been cured by objections and requests for admonition, which would have allowed the trial court to remedy any unfairness occasioned by the prosecutor's argument, avoiding any potential harm. Again, we perceive nothing in the record suggesting that an objection to any of the alleged instances of misconduct would have been futile. (See generally *People v. Dennis* (1998) 17 Cal.4th 468, 521; *People v. Boyette, supra*, 29 Cal.4th at p. 432.)

In addition, the mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel. (*People v. Williams* (1997) 16 Cal.4th 153, 221; *People v. Boyette, supra*, 29 Cal.4th at p. 433.) Defense counsel's failure to object

does not reflect ineffective assistance for the simple reason that there was no prejudicial misconduct. Even assuming that any of the prosecutor's rebuttal comments were improper, appellant suffered no prejudice from counsel's failure to object, and there is no reasonable probability the outcome would have been different had counsel objected and requested admonitions. (See *People v. Williams, supra,* at p. 224.)

V.

CRUEL OR UNUSUAL PUNISHMENT

Appellant was sentenced to 25 years to life for first degree murder, with a consecutive term of 25 years to life for the firearm enhancement imposed pursuant to section 12022.53, subdivision (d). Appellant asserts the indeterminate term for the firearm enhancement constitutes cruel or unusual punishment in violation of the California Constitution.

The firearm enhancements imposed pursuant to section 12022.53 have been uniformly upheld when challenged as imposing cruel and/or unusual punishment. (See, e.g., *People v. Martinez* (1999) 76 Cal.App.4th 489, 493-498; *People v. Riva* (2003) 112 Cal.App.4th 981, 1003; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212-1216; *People v. Taylor* (2001) 93 Cal.App.4th 318, 323-324; *People v. Felix* (2003) 108 Cal.App.4th 994, 999-1002; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-19; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230-1231.)

These enhancements have also been found not to violate equal protection even though similarly situated murderers using other kinds of deadly weapons are not subjected to an equally harsh penalty. (*People v. Perez* (2001) 86 Cal.App.4th 675, 678-680; *People v. Taylor, supra,* 93 Cal.App.4th at pp. 322-323; *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1114-1119.)

We are persuaded that the reasoning of these cases is sound and reject appellant's constitutional challenge.

DISPOSITION

The judgment is affirmed.

_____
HARRIS, Acting P.J.

WE CONCUR:

_____
LEVY, J.

_____
GOMES, J.